No. 96-1291

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DOLORES OUBRE,
Petitioner,
v.
ENTERGY OPERATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT

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38 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

FEDERAL CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC), the Chamber of Commerce of the United States (the Chamber), and the Edison Electric Institute (EEI) respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief supports the position of Respondent Entergy Operations, Inc. before the Court.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes 300 major U.S. corporations. EEAC's directors and officers include many of industry's foremost experts in the field of equal employment opportunity. Their combined experience gives EEAC valuable insight into the practical, as well as legal, issues surrounding the proper interpretation and application of fair employment laws and policies. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The United States Chamber of Commerce is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than three million busi-

[1] Counsel for EEAC, the Chamber, and EEI authored the brief in its entirety. No person or entity, other than EEAC, the Chamber, EEI, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

nesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

Amicus Edison Electric Institute ("EEI"), is the association of investor-owned electric utilities in the United States and their industry associates worldwide. EEI's U.S. members serve 99% of all customers served by the investor-owned segment of the electric utility industry. They generate about 78% of all the electricity generated by electric utilities, and service 76% of all ultimate customers in the nation. EEI members, who employ hundreds of thousands of employees, are now restructuring their companies as competition in the provision of electricity to end-use customers is being introduced in the states. Resolution of the issues raised in this case will have a significant impact on every EEI member. EEI is a frequent advocate on behalf of its members' interests in connection with important issues of law and policy that arise before courts, legislative bodies and regulatory agencies.

EEAC's members, as well as many of the Chamber's and EEI's members, are all employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (as amended), as well as other employment laws and regulations. As employers, and as potential respondents to ADEA charges and other employment related claims, these companies are interested in encouraging the voluntary resolution of such claims—both actual and potential—without the costs, risks, and other burdens associated with litigation.

When implementing workforce reductions, many employers offer special, added benefits to departing employees who agree to release legal claims they might otherwise assert against the employer. Individuals

who voluntarily accept this option by signing general releases receive enhanced severance benefits—*e.g.*, supplemental cash payments, extended health care coverage, additional pension benefits, and the like—over and beyond any benefits the employer has committed to provide upon termination of their employment. In return, the employer gains relief from the lingering uncertainties and potential liabilities it otherwise would face until expiration of the filing dates for all possible claims relating to the individual's employment. Because of the significant, mutual advantages they afford to both employees and employers, such release-for-consideration agreements are used widely in implementing workforce reduction programs throughout the United States.

Thus, the issues presented in this case are extremely important to the nationwide employer constituencies that EEAC, the Chamber, and EEI represent. Petitioner and her *amici* urge this Court to permit former employees, who have signed releases and accepted consideration in exchange, to sue their employers under the ADEA without returning the consideration they received. Such a rule of law would cast serious doubt on the finality of releases of claims under the ADEA. As a result, employers who would not offer additional severance pay, early retirement incentives, and other termination benefits without the protection of a release are likely to consider discontinuing such programs. Each discontinued program will harm the vast majority of individuals who elect to receive such benefits and have no interest in filing discrimination charges.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed briefs as *amicus curiae* in a variety of cases before this Court, the United States Courts of Appeal; and various state supreme courts. As part of this amicus activity,

EEAC has filed briefs with all of the circuit courts of appeals that have addressed this issue.[2] In addition, EEAC[3] and the Chamber[4] have participated in cases in this Court regarding the proper interpretation of the ADEA.

EEAC also served on the Equal Employment Opportunity Commission's Older Workers Benefit Protection Act Negotiated Rulemaking Advisory Committee. The Committee held meetings over an eight-month period and crafted a consensus document in the form of a proposed rule interpreting Title II of the OWBPA, which the Commission has published for notice and comment. *Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA)*, 62 Fed. Reg. 10787 (1997) (to be codified

[2] *Raczak v. Ameritech Corp.*, No. 94-8033 (6th Cir.) (petition for leave to appeal pursuant to Rule 1292(b)); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997); *Raczak v. Ameritech Corp.*, No. 95-1082 (6th Cir.) (on petition for rehearing); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997); *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *reh'g denied* (11th Cir. June 22, 1992), *cert. denied*, 506 U.S. 955 (1992); *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991).

[3] *Allied Van Lines v. Oberg*, No. 93-1605 (U.S.), *cert. denied*, 114 S. Ct. 2104 (1994) (application of ratification/tender back principles to ADEA releases); *K Mart Corp. v. Helton*, No. 96-98 (U.S.), *cert. denied*, 117 S. Ct. 447 (1996) (representative action procedure); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307 (1996) (comparator within protected class); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996) (pension accrual); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (definition of "willful" violation); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (arbitrability).

[4] *K Mart Corp. v. Helton*, No. 96-98 (U.S.), *cert. denied*, 117 S. Ct. 447 (1996); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1983) (standard for computing liquidated damages); *WCLR Radio Station v. Rengers*, 486 U.S. 1020 (1988) (damages).

at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997).[5]

Thus, EEAC, the Chamber, and EEI have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, EEAC, the Chamber, and EEI are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Dolores Oubre is a former employee of Respondent Entergy Operations, Inc. (Entergy). J.A. A-17.[6] After receiving a low performance ranking for 1994, she and others with similarly low rankings were offered two options. *Id.* One choice was to attempt to improve their performance ratings. J.A. A-18. The other was to take a voluntary severance package in exchange for a release of claims. *Id.*

The release, which is set forth in full at J.A. A-18-19 and J.A. A-61-62, covered "any and all claims, demands, damages, actions, or causes of action occurring on or before the date of the execution of this Release . . . that I may have against Entergy Operations, Inc. . . . which in any way relate to my employment by or my separation from the company." J.A. A-61. Oubre understood the terms, and indeed consulted two attorneys about the release. J.A. A-19. She accepted the package and signed the release. J.A. A-18. Oubre received everything due to her, and has not returned any money to Entergy. J.A. A-19.

Thereafter, Oubre sued Entergy, claiming that she was constructively discharged in violation of the ADEA. J.A. A-4-8. Oubre contended that the release she had signed was unenforceable because it did not

[5] The Committee agreed not to address in the proposed rule the issue presented to the Court in this case.

[6] J.A. refers to the Joint Appendix filed by the parties.

meet the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). J.A. A-19.

The district court granted summary judgment in favor of Entergy. Based on the Fifth Circuit's decisions in *Wamsley v. Champlin Refining & Chemicals*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), and *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996), the district court concluded that Oubre had ratified an otherwise voidable waiver by retaining the benefits. J.A. A-20. The Fifth Circuit affirmed. J.A. A-23. Oubre petitioned this Court for a writ of certiorari, which was granted as to the third question presented. 114 S. Ct. 1466 (1997).

SUMMARY OF ARGUMENT

"A party may not rescind a contract without returning to the other party any consideration received under it." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 260 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995). Retention of the consideration paid results in ratification of an otherwise voidable contract, including a contract to release statutory claims arising out of the employment relationship. *E.g., Deren v. Digital Equip. Corp.*, 61 F.3d 1 (1st Cir. 1995); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 937 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994).

The Fifth Circuit below, as well as the Fourth Circuit, correctly apply these basic principles to preclude a former employee from bringing suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, when that person has executed a release of ADEA claims and retained the consideration paid for the release. *Wamsley v. Champlin Refining & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Blistein v. St. John's College*,

74 F.3d 1439, 1466 (4th Cir. 1996). This Court's decision in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), which dealt with very different circumstances under a very different statute, does not apply.

Moreover, the waiver provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA), which set standards for an irrevocable release, do not abrogate the common law doctrine of ratification. To challenge a release, even one that arguably does not meet OWBPA's minimum requirements, a prospective plaintiff still must tender back the consideration.

Nothing in the statutory language of OWBPA allows a plaintiff to challenge a release as invalid while keeping the consideration received for signing the release. The legislative history likewise is silent. Since statutes in derogation of the common law must "speak" to the question, *United States v. Texas*, 507 U.S. 529, 534 (1993), OWBPA cannot be read to supplant the common law doctrine of ratification.

Moreover, application of the ratification/tender back doctrine is consistent with the purposes of the ADEA and OWBPA, as well as with sound public policy. Precluding ratification would substantially undermine an employer's reason for offering consideration in exchange for a release. Accordingly, such a rule would be likely to reduce substantially the amount employers would be willing to pay for releases.

ARGUMENT

AN ADEA CLAIMANT WHO FAILS TO TENDER BACK CONSIDERATION PAID FOR A RELEASE THAT DOES NOT MEET THE OWBPA REQUIREMENTS RATIFIES A VOIDABLE CONTRACT AND CANNOT CHALLENGE ITS VALIDITY

A. Under Established Principles of Contract Law, Which Apply to Contracts for the Release of Employment Discrimination Claims, an Individual Cannot Both Repudiate the Contract and Retain the Consideration

"The principle that a release can be rescinded only upon a tender of any consideration received is not a peculiarity . . .; it is a general principle of contract law, and would surely be a component of any federal common law of releases." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 260-61 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (citations omitted). A release or waiver of claims is a contract. *PMX Indus., Inc. v. LEP Profit Int'l*, 31 F.3d 701, 703 (8th Cir. 1994). An agreement to waive or release claims is voidable when it has been procured by circumstances that would make an ordinary contract voidable (*i.e.*, misrepresentation, duress or undue influence). *DiRose v. PK Management Corp.*, 691 F.2d 628, 633 (2d Cir. 1982), *cert. denied*, 461 U.S. 915 (1983) (holding that contract induced by duress is voidable, not void).

The avoidance of obligations under a voidable contract, however, is not automatic. The party seeking to avoid the contract must do two things: (1) act quickly to rescind the contract once the circumstances making the agreement voidable are discovered (*e.g.*, misrepresentation), or removed (*e.g.*, duress); and (2) return the consideration received for the contract. An otherwise voidable agreement—including a release of employment claims—may become a binding con-

tract by conduct that is inconsistent with an intent to rescind the agreement. *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 409 n.7 (9th Cir. 1992) (after accepting the benefits of an agreement for four years, party may no longer avoid the agreement based on claimed duress). Rescission does not simply terminate a contract after a particular date; it "unmakes" the contract so that the parties return as quickly and as nearly as possible to their respective pre-contract conditions. *See, United States v. Texarkana Trawlers*, 846 F.2d 297, 304 (5th Cir.), *cert. denied*, 488 U.S. 943 (1988) (party seeking rescission of contract must return proceeds); *In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) (acquiescing in a contract after the opportunity to avoid it, or failing to return benefits conferred under a contract, results in ratification of a voidable contract even if agreement was obtained under duress); *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1455 (9th Cir. 1988) (plaintiff was obligated to return the money he received for signing the release as a prerequisite to rescission).

Courts apply this basic contract principle to releases of employment claims. *See, e.g., Deren v. Digital Equip. Corp.*, 61 F.3d 1, 2 (1st Cir. 1995) (holding that plaintiffs' ERISA suit was barred under a contract waiving all claims, because plaintiffs' delay between accepting severance benefits and bringing suit ratified the release contract notwithstanding the allegedly coercive terms under which plaintiffs originally signed the agreement); *Fleming*, 27 F.3d at 260-61 (Title VII settlement agreement could not be rescinded without tendering back the consideration received); *Ferguson v. Runyon*, 1997 U.S. App. LEXIS 12492, *4 (7th Cir. May 22, 1997) (Title VII suit could not be brought without returning to employer consideration received for settlement); *Wag-*

ner v. Nutrasweet Co., 95 F.3d 527, 532 (7th Cir. 1996) (Title VII and Equal Pay Act claims require tender back where consideration for release surpassed payment to which employee otherwise was entitled); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 937 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994) (plaintiffs who did not return the consideration for their releases thereby ratified otherwise voidable releases and could not pursue employment claims under the WARN Act even assuming the releases were not knowing and voluntary); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (release of liability under employment compensation contract was ratified by acquiescence and accepting the severance benefits paid in exchange); *Somervell v. Baxter Healthcare Corp.*, 1997 U.S. Dist. LEXIS 7885, *14 (D.D.C. June 4, 1997) (barring suit under the ADA because plaintiff ratified unsigned release by retaining consideration).

The Fifth Circuit below, as well as the Fourth Circuit, correctly apply this rule to cases brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq. Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Blakeney v. Lomas Info. Sys., Inc.*, 65 F.3d 482 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996); *Blistein v. St. John's College*, 74 F.3d 1439, 1466 (4th Cir. 1996). The Third, Sixth, Seventh, and Eleventh Circuits do not. *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for cert. filed*, 60 U.S.L.W. 3840 (June 9, 1997) (No. 96-1988); *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997), *petition for cert. filed*, (June 18, 1997) (No. 96-2002); *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 511 U.S. 1108 (1994); *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992).

For the reasons set forth below, the view taken by the Fourth and Fifth Circuits is better.

B. This Court's Decision in *Hogue v. Southern Railway Co.* Is Not Applicable to Employment Discrimination Cases

Petitioner and her *amici* urge this Court to apply *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), in which the Court declined to require a tender back in the context of a release of claims under the Federal Employers Liability Act, 45 U.S.C. § 51 (FELA), to reach a similar result under the ADEA. As the Fifth Circuit properly concluded in *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995), *Hogue* addressed a different issue under significantly different circumstances and thus is inapposite to the issue presently before the Court.

1. Hogue *Interprets the FELA, Which Facilitates Tort Recovery for Injured Railroad Employees*

The FELA claim in *Hogue* involved a worker who injured his knee while working for the defendant railroad. Relying on the railroad's doctor's assurances that his injury was only a bruise, the worker signed a release in exchange for $105. Later, after two operations, including the removal of his kneecap, he sought to reopen his claim and seek additional compensation without returning the original $105.

When the railroad sought to enforce the release, this Court concluded that a "tender back is . . . not requisite when it is pleaded that the carrier and the employee entered into the release from *mutual mistake* as to the *nature and extent of the employee's*

injuries." *Hogue*, 390 U.S. at 517 (emphasis added).[7]

The Court's ruling in *Hogue* is not surprising, given the purposes of the FELA. The FELA provides a cause of action closely approximating workers compensation for railroad employees injured on the job.[8] The FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329 (1958). As the Court has explained, "[t]he cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier." *Id.*

The FELA effectuates this purpose by providing a remedy for an injured worker in virtually any situation where the employer's negligence was even remotely a contributing cause of the injury.[9]

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played *any part at all* in the injury or death.

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506-07 (1957) (citations omitted) (emphasis added). *See also, CONRAIL v. Gottshall*, 114 S. Ct. 2396, 2404 (1994) (quoting *Rogers*). The traditional common law defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine are unavailable under the FELA.[10] Instead, "[t]he burden of the employee is met, *and the obligation of the employer to pay damages arises*, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference [that negligence of the employer played a small part in the injury]." *Rogers*, 352 U.S. at 508 (emphasis added). Thus, liability for a FELA claim is significantly less difficult to establish than in other fault-based litigation.

2. *Because of the Significant Differences Involved,* Hogue *Is Inapposite to the Case at Bar*

The Seventh Circuit in *Oberg v. Allied Van Lines*,[11] 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct.

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[7] Instead, the Court directed, the original amount should be deducted from the ultimate award. *Hogue*, 390 U.S. at 518.

[8] The FELA is not a true "workers compensation" scheme imposing liability without fault. *CONRAIL v. Gottshall*, 114 S. Ct. 2396, 2404 (1994); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 509 (1957). Nevertheless, as discussed below, a "relaxed standard of causation applies." *CONRAIL*, 114 S. Ct. at 2404.

[9] The operative provision, 45 U.S.C. § 51 states:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, work, boats, wharves or other equipment.

[10] 45 U.S.C. § 53 (contributory negligence); 45 U.S.C. § 54 (assumption of the risk); 45 U.S.C. § 51 (fellow servant doctrine).

[11] Notably, another panel of the Seventh Circuit has questioned *Oberg*, stating "[t]he idea behind these cases . . . is a little obscure to us." *Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994).

2104 (1994), and the Eleventh Circuit in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. 955 (1992), as well as the panel majorities in *Raczak v. Ameritech Corp.*, 103 F.3d 1257 (6th Cir. 1997), *petition for cert. filed* (June 18, 1997) (No. 96-2002), and *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3840 (June 9, 1997) (No. 96-1988), all rely on the *Hogue* holding to conclude that employees who have failed to tender back consideration received for signing a release may nonetheless sue their employers for age discrimination under the ADEA. Because the actual issues, as well as the two statutes in question, have virtually nothing in common, the decision in *Hogue* is inapplicable to the situation presented here. *Wamsley v. Champlin Ref. & Chems.*, 11 F.3d 534, 540-542 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1266-68 (Boggs, J., dissenting); *Long v. Sears, Roebuck & Co.*, 105 F.3d 1529, 1549 (3d Cir. 1997) (Greenberg, J., dissenting).

In *Hogue*, the existence of liability was not at issue. "The fact of the injury was never in doubt." *Raczak*, 103 F.3d at 1267 (Boggs, J., dissenting). Given the "mutual mistake" as to the nature and extent of the injuries, the issue to be resolved was the extent of Southern Railway's liability *beyond* the first $105. 390 U.S. at 516. Because Hogue was entitled to the $105 in any event, there was no reason to require that he tender it back. Indeed, the employer in *Hogue* "confessed error" at ever having made the argument, and did not file a brief or present argument on the "tender back" issue before this Court. *Id.*

In ADEA cases, there is substantial controversy over the legitimacy of the underlying claim. For example, in contrast to *Hogue*, there is a real question

as to whether Respondent Entergy discriminated against Petitioner Oubre on the basis of age in the instant case, and thus whether she suffered an injury *at all* due to age discrimination, or would be entitled to *any* compensation from Entergy. Unlike *Hogue*, the money initially paid to Petitioner was not in satisfaction of any acknowledged liability, but rather, consideration given in exchange for her agreement to waive and release all claims.

As the Fifth Circuit pointed out in *Wamsley*, the Seventh Circuit in *Oberg*, in adopting the reasoning of the Eleventh Circuit in *Forbus*, followed *Hogue* without considering the differences between the FELA and the ADEA. 11 F.3d at 541 n.13. Instead, the Seventh Circuit relied solely on its perception that both are "remedial" statutes and concluded that they thus should be treated alike.

Unlike the "resource allocation" approach taken by the FELA, however, the ADEA provides a remedy only where an employer has discriminated on the basis of age. 29 U.S.C. § 623(a); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision."). The FELA was intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden," S. Rep. No. 460, 60th Cong., 1st Sess. 3, *quoted in Sinkler*, 356 U.S. at 330 (1958). By contrast, the ADEA's prohibitions are intended "to promote employment of older persons based on their ability rather than age; to prohibit *arbitrary* age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (emphasis added).

Moreover, to prevail on an ADEA claim for discriminatory termination, for example, the plaintiff must prove that he was discharged "because of" his age. 29 U.S.C. § 623(a)(1). Unlike the FELA—where the plaintiff need only show that the employer's conduct played only the "slightest" part in the injury—the plaintiff in an ADEA case must prove "that the employee's protected trait actually played a role in [the employer's decision making process] and had a determinative influence on the outcome." *Hazen Paper Co.*, 507 U.S. at 610. *Cf. St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2751 (1993) ("[W]e have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the *employer has unlawfully discriminated.*") (emphasis in original).

Thus, while the FELA imposes liability any time the employer's negligence played the slightest part in causing injury, the ADEA imposes liability only where the plaintiff proves not only that the employer's conduct affected the plaintiff, as under the FELA, but also that the plaintiff's age had a determinative role in the employer's action. Accordingly, as a practical matter, recovery by a railroad employee who is injured on the job is far more probable than by an employee who claims that an adverse employment action was based on age.

Thus, *Hogue* is decidedly inapposite to the case presently before this Court. It does not represent "federal common law" but rather is an interpretation of the specific terms of the FELA. As the Fifth Circuit stated in *Wamsley*:

> What Congress did under the FELA was something it has not yet done under the ADEA, that is, to legislatively facilitate an employee/claimant's recovery. Until Congress demonstrates its desire to promote "liberal," "unburdened and expeditious recoveries" to claimants under the ADEA, *Grillet* will remain sound authority and unaffected by *Hogue*.

11 F.3d at 541-42. Indeed, one federal judge aptly has noted, "it seems to me far-fetched to infer that the Supreme Court abrogated the ratification doctrine and tender back requirement for all federal remedial statutes in all cases through the medium of a three-paragraph *per curiam* opinion like *Hogue*." *Reid v. IBM Corp.*, 74 FEP Cases (BNA) 332, 344 (S.D.N.Y. 1997).

The better view is that *Hogue* does not supplant the general common law doctrine of ratification/tender back and should not be applied in the circumstances presented in this case.

C. The Older Workers Benefit Protection Act Does Not Abrogate the Common Law Doctrine of Ratification

As the Fourth and Fifth Circuit Courts of Appeals have held correctly, the outcome of a case in which a potential plaintiff has executed a release and retained the consideration should not differ where the case involves application of the waiver provisions of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (OWBPA). While Section 201 of Title II of the OWBPA sets standards for a *non-voidable*, "knowing and voluntary" waiver of claims under the ADEA, it does not displace the common law rule of ratification of a voidable agreement.

OWBPA was compromise legislation developed after years of discussion and numerous revisions. In 1988, during the waning days of the 100th Congress, legislation was introduced in both Houses to mandate supervision of ADEA waivers by the Equal Employment Opportunity Commission (EEOC), the federal agency with ADEA enforcement authority. Under both bills, every release covering age discrimi-

nation claims would have had to be supervised by the EEOC unless the individual already had asserted a "bona fide claim" of age discrimination against the employer. S. 2856, 100th Cong., 2d Sess., 134 Cong. Rec. S14,509 (daily ed. Oct. 4, 1988); H.R. 5500, 100th Cong., 2d Sess., 134 Cong. Rec. H10,154 (daily ed. Oct. 12, 1988). Congress adjourned without acting on either bill.

When the 101st Congress convened in 1989, ADEA waiver bills again were introduced in both Houses, this time differing slightly from their predecessors and from each other. The Senate bill, S. 54, retained the EEOC supervision requirement. S. 54, 101st Cong., 1st Sess., 135 Cong. Rec. S168 (daily ed. Jan. 25, 1989). The House counterpart, H.R. 1432, would have required instead that an ADEA release be approved by a court before signature. H.R. 1432, 101st Cong., 1st Sess., 135 Cong. Rec. H697 (daily ed. Mar. 15, 1989). As reported out of committee in 1989, the Senate version still required EEOC supervision where no "bona fide" claim had been made. S. Rep. No. 79, 101st Cong., 1st Sess. 3 (1989). The House version, on the other hand, would have permitted *no* waivers other than in settlement of a "bona fide claim." H.R. Rep. No. 221, 101st Cong., 1st Sess. 3 (1989). No further action was taken.

When Congress reconvened in 1990, rather than pursuing the previous bill language, the Senate Committee on Labor and Human Resources decided to add waiver provisions to S. 1511, a pending bill to amend the ADEA with respect to employee benefits. S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990). As the Committee Report on that legislation explains, the new waiver language "represents a change from the approach taken in the Waiver Protection Act (S. 54) that was reported out of the Committee last year." *Id.* at 31.

Indeed, the new waiver language added to S. 1511, styled "Title II—Waiver of Rights or Claims," provided a significantly different set of standards for irrevocable waivers of ADEA claims than did its predecessor bills. Most importantly, the bill eliminated the requirement for EEOC supervision and assertion of a "bona fide claim." In their place was an entirely new mandate involving a considerably different set of requirements.[12]

In April 1990, the House Education and Labor Committee met to consider H.R. 3200, the House companion bill to S. 1511. There, the 1989 House waiver bill, H.R. 1432, was added to the Committee bill. H.R. Rep. No. 664, 101st Cong., 2d Sess. 5 (1990). Thus, the House bill lacked the newer modifications added by the Senate Labor Committee.[13]

In the fall of 1990, the Senate passed S. 1511, containing the waiver standards as modified. 136 Cong. Rec. S13,611 (daily ed. Sept. 24, 1990). Shortly thereafter, the House passed S. 1511 in the same form as it had passed the Senate. That legislation became the Older Workers Benefit Protection Act. Pub. L. No. 101-433, 104 Stat. 978 (1990).

To summarize, OWPBA's waiver provisions began as a proposal to mandate government supervision of private agreements, and evolved into a list of minimum requirements for making such agreements irrevocable. As discussed below, however, nothing in the statutory language suggests that OWPBA allows an

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[12] For this reason, legislative history of prior versions is of little use in interpreting the final bill. Although the Senate Committee on Labor and Human Resources incorporated by reference the "need for the legislation" from a previous report, it did so only as to that section of the report, and only to the extent that it was consistent with the current version. S. Rep. No. 263, 101st Cong., 2d Sess. 15 (1990).

[13] Accordingly, none of the House proceedings other than final debate and passage are helpful legislative history for the bill.

individual who has signed a potentially revocable release to keep the consideration while challenging the release.

1. *OWBPA's Statutory Language Does Not Preclude Ratification*

Section 201 of the Older Workers Benefit Protection Act (OWPBA), Pub. L. No. 101-433 (Oct. 16, 1990), 29 U.S.C. § 626(f), provides that:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . [A] waiver may not be considered knowing and voluntary unless at a minimum [it meets the enumerated requirements].

Id. The basic prerequisites are: (1) an understandable written agreement; (2) with a direct reference to the ADEA; (3) that operates only retroactively; (4) in exchange for consideration. In addition the individual must be given (5) written advice to consult an attorney; (6) twenty-one days to make the decision; and (7) a seven day revocation period. 29 U.S.C. § 626(f)(1). In addition, where the waiver is "requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," each individual must be afforded forty-five days to make a decision, and must be given substantial information about the program, eligibility requirements, and the individuals who may and may not be participating. *Id.*

Although the OWBPA contains a number of specific requirements, neither its language nor its history state that the employee may set aside the release and keep the consideration. "[N]either the language nor the purpose of the OWBPA indicates a congressional desire to deprive an employee of the ability to ratify a waiver that fails to meet the requirements of the OWBPA." *Wamsley*, 11 F.3d at 539-40. If anything, the language of OWBPA more likely suggests that

noncomplying waivers are merely voidable, at the option of the individual, not void *ab initio*. *Blistein v. St. John's College*, 74 F.3d 1439, 1466 (4th Cir. 1996); *Wamsley*, 11 F.3d at 539. As the Fourth Circuit explained:

> From Congress' reliance upon the terms "knowing" and "voluntary," which parallel the common law concepts of fraud, duress and mistake, it is apparent that Congress was defining only those circumstances in which a contract would be voidable, not when it would be void. *See* S. Rep. No. 263 at 31-32, *reprinted in* 1990 U.S. Code Cong. & Admin. News at 1509, 1537 (referring to "the absence of fraud, duress, coercion, or mistake of material fact" in discussion of the 'knowing and voluntary' issue). For, at common law, fraud, duress and mistake did not void a contract, but rather, only rendered that contract voidable. *Wamsley*, 11 F.3d at 538 (citing Restatement (Second) of Contracts § 7 cmt. b).

Blistein, 74 F.3d at 1466.[14]

The Seventh Circuit, in *Oberg v. Allied Van Lines*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), incorrectly viewed OWBPA's "may not waive" language to mean that releases that did not meet the minimum OWBPA standards were void and incapable of being ratified under any circumstances. 11 F.3d at 683.[15]

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[14] The EEOC's proposed regulations interpreting the OWBPA likewise reflect this point. The proposal provides, "Other facts and circumstances bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver." 62 Fed. Reg. 10787, 10790 (1997).

[15] Inexplicably, the Seventh Circuit relied on *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992), and *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991), for this proposition. Both of those cases arose prior to

In fact, a clarification given on the Senate floor by the bill's sponsors shortly after passage suggests that Congress did intend to give individuals the latitude to forego the Act's specific requirements if they choose to do so. Section 201(f)(1)(F), one of the specific requirements for a "knowing and voluntary" waiver, requires that an individual be given either 21 or 45 days to consider the agreement, depending upon the type of program involved. 29 U.S.C. § 626(f)(1)(F). A colloquy between Senator Metzenbaum, the bill's chief Senate sponsor, and Senator Hatch indicates that the Senators intended to allow individuals to waive the Act's protections and take less than the minimum stated time to sign. Senator Hatch asked whether the minimum time periods could be shortened at the individual's option. Senator Metzenbaum responded:

> Of course, an employee may determine that he or she does not wish to wait the full 21 or 45 days, and may desire to enter into the agreement prior to that time. A shorter period of time is permissible as long as the employee's decision to accept such shorter period of time is knowing and voluntary.

136 Cong. Rec. S13,808 (daily ed. Sept. 25, 1990) (statement of Sen. Metzenbaum). This colloquy demonstrates that Congress intended for individuals to be able to waive the minimum requirements if they so desire.

Thus, nothing in either the language or the legislative history of OWBPA precludes application of the doctrine of ratification.[16]

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passage of the OWBPA, however, and neither case addresses the "may not waive" language.

[16] Intriguingly, the Third Circuit majority in *Long* and the Government in its brief to the Court in this case attempt to construct a legislative basis for their position by mischaracterizing a letter

2. *Since Congress Did Not Indicate That OWBPA Was Intended to Supplant the Common Law, It Should Not Be Read as Doing So*

Since neither OWBPA nor its legislative history addresses the issue of ratification, it is presumed that Congress intended the common law doctrine to

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submitted to Congress by a major corporation while OWBPA was under consideration. *Long*, 105 F.3d at 1540 n.19; *Brief of the United States and the Equal Employment Opportunity Commission* (hereinafter EEOC Brief) at 24. The EEOC brief contends that "it was understood that the OWBPA would permit an employee who signed an invalid waiver to pursue his or her ADEA claim while retaining the separation benefits paid under the waiver." The agency bases its conclusion on a letter from IBM to the Senate Labor Subcommittee, quoted in minority views to two Congressional Committee reports. H.R. Rep. No. 664, 101st Cong., 2d Sess. 87 (1990) (dissenting views); S. Rep. No. 263, 101st Cong., 2d Sess. 64 (1990) (minority view). The EEOC brief summarizes the IBM letter thus: "At least one corporation raised the concern that it would have to bear the high costs of litigating ADEA claims even where it had paid significant consideration for releases as part of a departure program." EEOC Brief at 24.

In reality, IBM was responding to S. 54, a very early waiver bill, that would have forbidden *any* waiver of ADEA claims unless it was either in settlement of a "bona fide claim" of age discrimination or supervised by the EEOC. 135 Cong. Rec. S168 (daily ed. Jan. 25, 1989). Expressing concern that the waiver bill would cause employers to eliminate or reduce programs offering additional benefits to departing workers, the Committee reports *accurately* quote IBM as saying,

> IBM considers the right to require an enforceable release of all employment-based claims in exchange for the significant consideration given as part of such programs an important one. There is no reason an employer should be expected to make these significant payouts and then have to bear the high costs of litigating ADEA claims with the recipients.

H.R. Rep. 664 at 87; S. Rep. 263 at 64 (quoting Letter of J.G. Parkel, IBM Corp., to Hon. Howard M. Metzenbaum, Chairman, Sen. Lab. Subcomm., Mar. 21, 1989, *reprinted in Waivers Under the Age Discrimination in Employment Act: Joint Hearing Before the Select Comm. on Aging and the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Lab.*, 101st Cong., 1st Sess. 142 (1989)). Nothing in the letter suggests that IBM had any intention of both making significant payouts in exchange for a release and still having to litigate with the recipients.

stand. It is a basic tenet of statutory construction that "[a]bsent an indication that the legislature intends a statute to supplant common law, the courts should not give it that effect." Sutherland Stat. Const. § 50.01 at 90 (5th ed. 1992). As this Court has noted:

> longstanding is the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." . . . In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

United States v. Texas, 507 U.S. 529, 534 (1993) (citations omitted). *Accord, Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident."). The "may not waive" language, the only words that even arguably touch on this issue, falls far short of the standard established by this Court in *United States v. Texas* for statutory abrogation of a common law principle. Since the OWBPA does nothing of the sort, the common law rule applies.

This conclusion is supported further by the fact that the only published decisions addressing the tender back issue in the ADEA context when the OWBPA was passed *applied* the ratification doctrine. *O'Shea v. Commercial Credit Corp.*, 734 F. Supp. 218 (D. Md. 1990), *aff'd*, 930 F.2d 358 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Widener v. ARCO Oil & Gas Co.*, 717 F. Supp. 1211 (N.D. Tex. 1989); *Constant v. Continental Tel. Co.*, 745 F. Supp. 1374 (C.D. Ill. 1990). Since Congress did not address the ratification/tender back doctrine directly, it can be presumed that Congress knew of this precedent and allowed it to stand. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Indeed, where Congress intended to adopt a standard different from that applied in case law on a particular issue, it noted the case and expressed its disapproval. *E.g.*, S. Rep. No. 263, 101st Cong. 2d Sess. 32 (1990).

The FELA amply demonstrates how Congress *does* address this issue when it chooses to do so. The FELA explicitly provides that any contract seeking to limit an employer's FELA liability is *void*, but allows a setoff for money previously paid by the employer. 45 U.S.C. § 55.[17] The ADEA contains no such provision. Had Congress wanted to include language in OWBPA declaring void and incapable of ratification a release that does not meet all of the statutory requirements, it clearly could have done so. It did not.

3. *Application of the Ratification/Tender Back Doctrine Is Consistent With the Purposes of the ADEA and OWBPA as Well as Public Policy*

As this Court has noted, "out of court dispute resolution . . . is consistent with the statutory scheme established by Congress [in the ADEA]." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29

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[17] 45 U.S.C. § 55 states:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee for the person entitled there to on account of the injury or death for which said action was brought.

(1991). As the Fifth Circuit pointed out in *Wamsley*, an interpretation of the OWBPA precluding ratification of defective ADEA releases "would be inconsistent with one of the expressed purposes of the ADEA: to 'help employers and workers find ways of meeting problems arising from the impact of age on employment.'" 11 F.3d at 539 (quoting 29 U.S.C. § 621(b)). "The simplest and easiest way to further this purpose," the Fifth Circuit stated, "is to give effect to the private agreements which resolve age related employment problems without the inevitable delays and costs associated with litigation." *Id.* Accordingly, the Fifth Circuit continued,

> Were employers forced to assume the risk that noncompliance with all of [the] statutory requirements of section 626(f)(1) renders a waiver agreement for which they have paid valuable consideration void and thus, not capable of being ratified, clearly they would be disinclined to propose such solutions.

Id.

The Fifth Circuit is quite correct. Like Entergy, many employers who are faced with the necessity of workforce reductions offer special severance benefits to ease the impact of lost employment. The benefits provided by these programs often are quite substantial and far in excess of any to which the employees otherwise would be entitled. Some employers, depending upon financial circumstances and other considerations, also offer early retirement incentives and other voluntary termination programs in lieu of layoffs.

Because these employers voluntarily are offering benefits considerably more than they are legally obligated to pay, they frequently require that the employees who choose to receive these additional benefits execute a release of claims in return. The Equal Employment Opportunity Commission estimates that more than 13,700 employers a year offer programs

involving benefits in exchange for waivers. *Waivers of Rights and Claims Under the Age Discrimination in Employment Act*, 62 Fed. Reg. 10787, 10789 (to be codified at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997). Of course, employees cannot be forced to sign releases against their will, but those who do not sign do not receive the additional benefits. In this manner, the employer buys peace, and employees who choose to participate receive substantial additional benefits.

Absent a tender back requirement, disgruntled former employees are free to ignore their part of the bargain, while retaining the consideration paid to them in exchange. As the Fourth Circuit observed disapprovingly in *Blistein*, such a rule "would . . . allow [them] to have it 'both ways,' to retain the benefits that they received pursuant to their retirement agreements, yet to challenge, through suits against their unsuspecting employers, the very agreements under which those benefits were extended." 74 F.3d at 1466.

Such latitude creates a substantial disincentive for employers to offer such benefits. Even for those employers that continue to do so, the lack of certainty will substantially reduce the amount they are willing to pay for a partial release.

Moreover, the minimum requirements of the OWBPA are hardly the "cookbook" that Petitioner's *amicus* American Association of Retired Persons (AARP) perceives them to be. *Brief of the AARP* at 16. The various requirements are capable of sufficient different interpretations to generate substantial uncertainty even for an employer that meticulously has attempted to meet them. As one commentator has stated, "[t]he nature of some of the OWBPA conditions . . . may make achieving—and proving—compliance more difficult than it seems and could undermine the certainty and expense control a release

agreement is designed to afford." Glen D. Nager & Steven T. Catlett, *Employees Can't Have Their Cake and Eat It Too: Estopping Age Discrimination Complainants Who Have Signed Releases*, 19 Employee Rel. L.J. 295, 296-97 (1993). Indeed, the minimum OWBPA requirements are ambiguous enough that the EEOC convened a negotiated rulemaking committee to draft proposed rules interpreting them. *Waiver of Rights and Claims Under the Age Discrimination in Employment Act*, 62 Fed. Reg. 10787, 10788 (1997) (to be codified at 29 C.F.R. pt. 1625) (proposed Mar. 10, 1997).[18]

Thus, it is surprisingly easy for potential plaintiffs to attack a release as falling short of the OWBPA standards. For example, they may disagree with the scope of the "organizational unit," identified by the employer to comply with 29 U.S.C. § 626(f)(1)(H)(ii). *Griffin v. Kraft Gen. Foods*, 62 F.3d 368 (11th Cir. 1995). *Cf. Long v. Sears, Roebuck & Co.* They may differ on whether the employer provided the right type of information as to the "job title" or "job classification" of eligible and ineligible employees, as they did in *Raczak v. Ameritech*. Several courts of appeals already have reached the conclusion that OWBPA compliance is a complex factual issue. *Raczak*, 103 F.3d at 1262 ("[W]e hold that the terms 'job title,' 'job classification,' and 'organization unit' should be interpreted on a case-by-case basis, with an eye to the purposes of the Act, rather than a dogmatic exercise in definition."); *Kraft*, 62 F.3d at 373. Naturally, "it is in the interest of the worker trying to void the release to quibble with whatever definition was used by the company." *Raczak* at 1263.

Indeed, a prospective plaintiff can cast doubt on the validity of the release merely by alleging, as plaintiffs did in *Wamsley*, that they were told orally they had less time than the statutory minimum to consider and sign the release, even though the documents allowed the full statutory period. 11 F.3d at 537. Any of these challenges will plunge the employer into litigation over the validity of the release—precisely the result the employer had hoped to avoid by purchasing a release.

[18] Not surprisingly, the Committee was unable to reach consensus on the ratification/tender back issue, and thus no rule is proposed on that point. *Id.*

This scenario—all too real—would so limit the utility of waivers that they would become virtually useless to employers. As Seventh Circuit Chief Judge Posner observed in *Fleming*, "[n]ot even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge." 27 F.3d at 261. Even more likely, as the Fifth Circuit recognized in *Wamsley*, it follows that employers who choose not to provide additional severance benefits without a release in return simply will cease offering such benefits.

Since reductions in force still may be a financial necessity or business option from time to time, however, layoffs will still occur—but without the additional benefits offered in the past. As a consequence, the many employees who face layoffs but have no grounds to challenge their terminations will be deprived of a substantial payment that might mean the difference between financial security and financial peril.

The contention that requiring a tender back of consideration gives employers a "windfall" is ludicrous. If the release is enforced, the employer gets the benefit of its bargain, no more, no less. If the release is determined to be invalid, but no tender is required, the employer is placed in the worst possible position—

it is out the consideration, but still must defend itself in litigation. If the release is determined to be invalid and tender *is* required, then the parties are simply restored to the *status quo ante*—the employer has its money back, but has no protection against the forthcoming litigation that the former employee is now free to bring.

Similarly, the contention that prospective plaintiffs should not be expected to return the benefits because they need the money, or already have spent it, loses sight of the fact that this is consideration for a promise, not money to which they otherwise are entitled.

Tender back of consideration paid for a release is a basic tenet of contract law that is not inconsistent with the true purposes of the ADEA. While the OWBPA provides for minimum requirements for an irrevocable release,[19] nothing in either statute suggests that either party can revoke the deal and keep the consideration. Elimination of the rule may result in employers offering less—if any—severance benefits and hurt those older workers who look forward to retirement with an extra "golden parachute" from the company.

CONCLUSION

For the foregoing reasons, the *amici curiae* Equal Employment Advisory Council, the Chamber of Commerce of the United States, and the Edison Electric Institute respectfully submit that the decision of the court below should be affirmed.

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[19] The argument of Petitioner's *amicus* the National Employment Lawyers Association that "waivers should not be subject to the rule of tender back that applies to releases" does not withstand scrutiny. *Brief of National Employment Lawyers Association* at 5. If this were correct, then it would seem to follow that releases such as the operative document in the instant case would not be subject to the OWBPA requirements that apply to waivers.

Respectfully submitted,

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